IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 81 of 1993

For Approval and Signature:

THE HON'BLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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BOI FINANCE LIMITED - Petitioner(s)

Versus

ARVIN OXYGEN PRIVATE LIMITED - Respondent(s)

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Appearance :

MR SUNIT S SHAH for Petitioner No(s).: 1.

MR KG SHETH for Respondent No(s).: 1.

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CORAM :THE HON'BLE MR.JUSTICE K.A.PUJ

Date : 15/06/2005

ORAL JUDGMENT

1. The petitioner has filed this petition under Sections 433, 434 and 439 of the Companies Act, 1956 for winding up of the respondent Company on the ground that the respondent Company has failed to discharge its financial liability towards the petitioner.
2. It is the case of the petitioner that pursuant to the negotiation between the petitioner and the respondent Company, a lease agreement was entered into between the petitioner and respondent Company on 22.3.1990 under which the petitioner leased to the company and the company took on lease from the petitioner certain equipments described in Schedule-I to the Lease Agreement. The non cancellable fixed period of lease was for 60 months commencing from 1.4.1990. The respondent Company was bound by the said fixed period of lease, however the Lease Agreement could be terminated by the petitioner prior to the expiry of the said fixed period only in the event of the defaults and breaches committed by the Company as set out in Clause-9 of the Lease Agreement. The monthly lease rental was fixed at Rs.89,535/- to be paid by the Company to the petitioner by the 1st day of every month with the provision for payment of interest at the rate of 21% for delay in payment. Clause 10.4 of the Lease Agreement entitled the petitioner to vary and revise the lease rentals with the Company being bound by such variation or revision.
3. It is also the case of the petitioner that the respondent Company received and accepted all the equipments leased to it under the Lease Agreement and put the same to use without any objection of any kind whatsoever. It is also the case of the petitioner that in accordance with Clause 10.4 of the Lease Agreement, the petitioner duly and validly revised the monthly lease rentals under the Lease Agreement from Rs.89,535/- to Rs.98,700/- per month. The revision being effective from 1.12.1991, the respondent Company accepted this variation without any objection.
4. It is also the case of the petitioner that the respondent Company made payments towards the recurring lease rentals upto 31.7.1991 in respect of the Lease Agreement. However, with effect from 1.8.1991, the Company failed and neglected to pay any amounts towards the recurring lease rentals even though the Company continued to make use of and enjoyed the benefit of the

equipments leased to it under the Lease Agreement. The Company became liable to pay arrears with interest at the rate of 21% and also to pay the recurring lease rentals as and wen they fell due for payment. Despite the repeated requests, the Company failed and neglected to pay the arrears or the recurring lease rentals. The petitioner, therefore, by its advocate's letter dated 9.7.1992 called upon the Company to pay arrears of lease rentals then aggregating to Rs.11,80,708/- under the Lease Agreement together with interest thereon. The petitioner also called upon the Company to pay the balance amount payable by the Company for the remaining fixed period of lease which also the petitioner had become entitled to claim and recover and the Company had become liable to pay in terms of the Lease Agreement. The said statutory notice was served on the respondent Company. The respondent Company has wrongfully failed and neglected to pay the outstanding dues or any part thereof and also failed and neglected to compound or secure the same to the satisfaction of the petitioner. The petitioner is, therefore, constrained to file present petition before this Court.

5. This Court has issued notice on 28.7.1993. On notice being issued, respondent Company has filed its appearance and affidavit in reply was filed on 8.11.1993. The petitioner filed its affidavit in rejoinder on 28.3.1994. Further affidavit was filed on behalf of petitioner on 29.7.1997 and affidavit in reply and explanation to the petitioner's further affidavit dated 29.7.1997, was filed on 11.8.1997. After considering the contents of the petition, affidavit in reply, affidavit in rejoinder and further affidavit, this Court has admitted petition on 16.9.1997 and order regarding advertisement was also passed on the same day. Pursuant to the said order, an advertisement was published in “Gujarat Samachar”, Ahmedabad, Surat, Rajkot and Baroda Edition as well as in “Indian Express” Baroda and Ahmedabad Edition. An affidavit to this effect alongwith the relevant newspaper cuttings was filed before the Court on 28.1.1998.
6. At the time of admission of the petition this Court has passed detailed order dealing with all the contentions raised on behalf of the respective parties. The Court has observed in the order dated 16.9.1997 that the foundation of the petition is that under lease agreement dated 22.3.1990, as on 9.7.1992, the respondent company was liable to pay the petitioner an amount of

Rs.32,07,100/- for which notice under Section 434 was served at the registered office of the respondent Company. Despite due service of the said notice, the Company had not responded and has neglected to pay the amount due to the petitioner. No reply to the notice under Section 434 of the Act has been made by the respondent Company. The Court has also observed that the respondent Company has filed its reply raising the plea that the nature of lease agreement by referring the same to be a hire purchase agreement and also dispute about the lease money or hire purchase installments payable under the agreement on account of defective supply of nine gas cylinders and also disputes as to the rate of interest charged on the amount referable to short supply. The respondent Company has, however, admitted that it was liable to pay a total amount of Rs.33,89,352/- under the agreement, against which it had paid Rs.14,85,039.60 ps and no dispute pertains to the balance amount remaining to be paid to the petitioner Company which exceeds Rs.19 lacs. The Court has also recorded further facts to the effect that after filing the winding up petition, the petitioner has filed a Civil Suit in the High Court of Judicature, at Bombay for recovery of the sum due under the said lease agreement. In the plaint, plaintiffs have averred after referring to the Company Petition filed by them that the suit is filed by the said Company, which the Company will proceed with it.

7. The Court has also recorded the statement of the learned advocate appearing for the respondent to the effect that under the lease agreement, the parties have agreed to submit to jurisdiction of the Civil Court in Bombay in all matters, claims or disputes arising out of the contract and thus, excluded the jurisdiction of this Court for initiation of the proceedings under the Companies Act in connection with the claims arising out of the said contract. The Court has also considered the principle enunciated in Brij Mohan vs. State of Rajasthan AIR 1994 SC 740, and Nahan Foundry vs. Mohanlal Khimjibhai &Sons 15 GLR page 897 and also Angile Insulations v/s Devy Ashmore India Ltd. And another (1995) 4 SCC 153 that any agreement which is not contrary to any statute is binding on the parties.
8. While dealing with the above contentions the Court has considered that the principle is well known that, by agreement, the parties cannot confer the jurisdiction on a Court where it has none. The principle also does not admit of any exception

that where there are more than one Courts, having jurisdiction to entertain and try a suit, the parties can agree to exclude the jurisdiction of the one and submit to the jurisdiction of another as per the agreement, it being not contrary to the public policy, does not contravene the provisions of the Contract Act, But for the operation of this ratio, the basic condition is that, there must be more than two forums available for a particular relief, to be proceeded with by the parties leaving room for freedom to choose the forum out of many choices. The Court has further observed that the relief for securing the winding up of the Company is not a relief arising out of a contract nor it is for the purpose of endorsement of any contract. The agreement choosing forum to which the parties can reach, and to which the above principle is referable, is for enforcement of rights arising out of contract and not rights which have been conferred by statute.

9. The Court has further observed that Section 10 of the Companies Act confers exclusive jurisdiction on the High Court in the matter of petitions or applications to be filed under the Companies Act. The High Court has jurisdiction in relation to the place at which the registered office of the Company concerned is situated and it has the exclusive jurisdiction in respect of the petitions or applications made in connection therewith under the Companies Act, Thus, for any petition or application for winding up of a Company under the Companies Act, the exclusive jurisdiction in respect of the companies registered within the State of Gujarat, rests with the High Court of Gujarat, except to the extent such jurisdiction has been conferred on District Courts, subordinate to this High Court, under sub-section (2) of Section 10 of the Act. The Court has, therefore, come to the conclusion that in the face of exclusive jurisdiction conferred on the High Court under the Statute, the question of any party contracting itself out by their option simply does not arise. The decisions referred to by the learned counsel have no relevance to the questions about jurisdiction of High Court under the Companies Act.

10. The Court has also considered another preliminary objection that has been raised by the learned counsel for the respondent. It is that the winding up petition has been founded on notice dated 9.7.1992 under Section 434 of the Companies Act. However, it is urged that after the said notice, two more notices have been served calling upon the respondents to pay a specified sum which

are dated 21.1.1993 and 15.5.1993. The later notice supersedes the earlier notice and therefore, petition cannot be founded on notice dated 9.7.1992. While dealing with this preliminary objection, the Court has observed that the respondent has not placed on record the notice received by it, which he has admitted to have received. The petitioner in his rejoinder affidavit has explained that notices dated 21.1.1993 and 15.5.1993 related to dishonouring of cheques issued by the respondent in partial payments of overdues and to initiate proceedings under Section 138 of the Negotiable Instruments Act and have no relation to the proceedings under Section 434 of the Companies Act. The fact of issuing cheques and their having been dishonoured are not in dispute. Therefore, there was no reason not to accept that the nature of the subsequent notices being entirely different, there was no room to invoke principle of later notice obliterating earlier one. The Court has, therefore, held that the preliminary objection on this ground was not sustainable and was overruled.

11. The Court has also dealt with third preliminary objection raised by the learned advocate for the respondent and that was with regard to the maintainability of the petition. It was urged before the Court that the petitioner having two remedies for enforcing his claim arising under the lease agreement, has since filing of petition opted to have recourse to file a Civil Suit in the High Court of Judicature at Bombay for the recovery of the very same amount, for which this winding up petition has been made and in that view of the matter, the petitioner cannot now be permitted to proceed with the winding up petition. The Court has felt that this objection was also without substance. The Court further observed that the Suit for enforcing recovery and petition seeking winding up of the Company on the plea of its inability to pay its debt are neither substitute for each other nor alternative to each other. As a matter of fact, the two are independent and different remedies aimed at different objects, though founded on same event, namely, non-payment of dues. While the purpose of a Civil Suit or other remedies for the purpose of enforcing recovery under a contract is primarily to secure return of one's dues from the other which are outstanding. In other words, it is for enforcement of contractual obligations. The petition for winding up on the other hand is aimed to remove the respondent company from the field of business altogether in general interest by bringing its

corporate entity to a close. It is not for enforcement of contractual obligation. The Court, therefore, has come to the conclusion that neither the fact of filing a petition by a creditor on the ground that respondent is unable to pay its debt affects his right to file a Civil Suit for enforcement of his claim against the respondent Company, nor pursuing a remedy for enforcement of the claim under the lease agreement be fatal to right of a creditor to invoke the jurisdiction of the Company Court in appropriate cases to secure the winding up of the Company. The filing of suit will only be a factor to be taken into consideration while exercising discretion to order winding up of the Company, which also entail consideration of the fact whether plausible defence which can reasonably be substantiated in law, if the Civil Suit is filed, exists between the parties. The Court has taken the view that the mere fact that the respondent has chosen to file a suit for the recovery of the specified sum after filing of the winding up petition in respect of claims arising out of the said lease agreement, by itself does not result in making the petition infructuous or estops the petitioner from pursuing this petition. Such course even be necessitated to save suit from becoming barred by limitation.

12. The Court has also dealt plausible defence to the claim raised by the petitioner to the effect that the claim made by the petitioner is the subject matter of trial in the Civil Suit and hence the Court should not exercise jurisdiction to order winding up of the Company. The Court has not entered into the details of the question raised by the respondent, at the stage of admission of the petition, however the Court has observed that there was a admission of the claim to the extent of Rs.19 lacs which are outstanding and in this view of the matter the Court observed that in respect of the amount claimed due by notice under Section 434 of the Companies Act, the disputes if any relating to the balance would not affect the presumption raised under Section 434 of the Act about the company being unable to pay its debt.

13. After discussing all the submissions raised before the Court, the petition was admitted and after the admission of the petition, there was no improvement in the financial position of the respondent Company nor any material was produced before the Court so as to establish that the Company is in a position to discharge its financial liability. Mr.K.G.Sheth, learned advocate appearing for the respondent Company reiterated the

same submissions which were made before the Court at the time of admission of the petition and has further submitted that since debts are disputed the winding up petition is not proper course and simply because Company has not made the payment, the Court should not pass the winding up order against the respondent Company. Except this, no new submission has been made by Mr.Sheth, learned advocate for the respondent.

14. After having heard the learned advocates for the parties and after having gone through their pleadings contained in the memo of petition, affidavit in reply, affidavit in rejoinder and further affidavits and after having gone through the documentary evidences which are produced before the Court, the Court is of the view that Company has failed to discharge its financial liability towards the petitioner. In other words, the Company has failed or neglected to pay the debt dues to the petitioner. The financial substratum of the Company has gone down. Even the time sought for by the respondent Company before the Court on different occasions on the ground that there was possibility of settlement, has gone in vain, as nothing has been produced on record in relation to the talks of settlement or any decision was taken by the parties pursuant to the alleged settlement. The Court is in complete agreement with the reasoning given by the Court at the time of the admission of this petition, in the order dated 16.9.1997 passed at the time of admission of petition.

15. Considering over all view of the matter and having regard to the settled legal position so far as winding up provisions are concerned, the Court hereby passes the order of winding up of the respondent Company and the Official Liquidator attached to this Court is hereby appointed as Liquidator of the Company and is directed to take charge of the assets of the respondent Company and to exercise all powers conferred on him under the provision of the Companies Act. It is further clarified that before taking the charge of the assets of the Company, the Official Liquidator should intimate to the secured creditors and directors of the Company and before appointing security agency or the valuer for taking out inventory, the Official Liquidator should take prior permission of this Court.

16. With these directions and observations this petition is accordingly disposed off.

(K.A.PUJ,J.)

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